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Initial Review

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 Appeal  
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 3106

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
Before the Board of Patent Appeals and Interferences

In the application of : Appeal No.  
 ANTHONY SMITH :  
 Serial No. 506,851 : Group Art Unit 3105  
 Filed 25 July 1995 :  
 For HOSPITAL LIQUID : Examiner C. Phillips  
 SANITATION CART :  
 SANITATION CART

## APPEAL BRIEF FOR APPLICANT-APPELLANT

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**APPEAL BRIEF FOR APPLICANT-APPELLANT****1. REAL PARTY IN INTEREST**

The real party in interest is Applicant, Anthony Smith.

**2. RELATED APPEALS AND INTERFERENCES**

No related appeal or interference is known.

**3. STATUS OF CLAIMS**

Appeal of claims 1 to 8 is waived in this Brief. Such waiver will be confirmed by subsequent amendment or equivalent if needed.

**Appealed Claims** 9 to 20 are appended thereto in **Appendix A**, as they read without entry of a Proposed Amendment (**Appendix B**), and in **Appendix C** as they'd read upon entry of the Amendment (claims 9-17).

**4. STATUS OF AMENDMENTS**

The Examiner's second action rejected all claims, and advisory action denied entry of a Proposed Amendment After Final, **Appendix B**, even in the event of appeal--ostensibly because adding "cart" to claim 9 would require further search--despite being in claims 16-17.

The Proposed Amendment would merely add "cart" to claim 9--and would cancel claims 18 to 20, which otherwise remain in this appeal.

**5. SUMMARY OF INVENTION****A. Technical Background**

This invention provides a new **Hospital Liquid Sanitation Cart**, admittedly sparked in part by Applicant's own Patent 5,117,511 for a **Liquid Disposal Automobile Accessory**, noted in this specification--but first relied upon in the final rejection (on the second action).

**B. The Invention Itself**

The appealed claims feature mobile sanitation (cart) apparatus having temporarily deformable elastomeric receptor means extensible to receive a patient's waste liquid, for transport through flexible tubing to a storage compartment in housing means of the apparatus, rinsed down by water pumped from another compartment in the housing.

**C. Representative Claims - APPARATUS (only)****Without Proposed Amendment**

9. *In mobile sanitation apparatus having housing means, ..temporarily deformable elastomeric receptor means for a patient's waste liquid,*

*tubular means adapted to conduct the waste liquid from the receptor means into a temporary waste liquid storage compartment in the housing means, and*

*rinse means for rinsing clean the waste liquid path from the receptor means into the storage compartment.*

12. *...wherein the temporary storage compartment is at a height enabling it to be positionable over and be discharged into a toilet bowl as well as into an underlying conventional drain.*

**With Proposed Amendment**

9. *In mobile sanitation cart apparatus having housing means, ..temporarily deformable elastomeric receptor means for a patient's waste liquid,*

*tubular means adapted to conduct the waste liquid from the receptor means into a temporary waste liquid storage compartment in the housing means, and*

*rinse means for rinsing clean the waste liquid path from the receptor means into the storage compartment.*

**C. Representative Claims - (cont'd)**

13. *In mobile sanitation means, the improvement comprising elastomeric receptor means for waste liquids, having a base with a discharge outlet and having a hollow wall upstanding surrounding a major part of the base and having an opening into the wall hollow and openings connected therewith through and along the wall and facing inward therefrom for rinse water supplied to the hollow to flow down the wall and over the base to the discharge opening.*

16. *The improvement combination according to claim 14, wherein the flexible discharge outlet tube has a rest position relative to a mobile sanitation cart, when not receiving waste liquid or rinse water, and may be extended from its rest position to relocate the elastomeric receptor means in a variety of extended use positions.*

17. *The improvement according to claim 13, in combination with a mobile sanitation cart having a rest position for the elastomeric receptor means, wherein the supply of rinse water is discontinued whenever the receptor means is in the rest position.*

**6. ISSUES PRESENTED****A. Art Rejection under 35 USC 102**

Whether one or both of claims 13 or/and 17 is/are unpatentable under 35 USC 102 as anticipated by SMITH (Applicant's prior patent)?

**B. Art Rejection under 35 USC 103**

Whether one or more of claims 9 to 12, also 14 to 20, is/are unpatentable under 325 USC 103 over SMITH in view of COFFMAN et al?

#### 7. GROUPING OF CLAIMS

Independent claim 13 and its dependent claim 17 do not stand or fall together because claim 13 is drawn to an elastomeric receptor means of specified shape, whereas claim 17 claims the receptor means in combination with a "mobile sanitation cart" of defined features.

Independent claim 9 drawn to mobile sanitation means--and its dependent claims 10 to 12--do not stand or fall with claims 14 to 20 dependent upon independent claim 13 drawn to such a receptor means.

Claim 9 and its dependent claims 10 and 11 may stand or fall together, but not 12, which recites that the storage compartment for wastewater is positionable over a toilet bowl for discharge.

Claims 14 to 20 (all dependent upon claim 13) do not stand or fall together because claim 14 recites a flexible discharge outlet tube for connection to receive waste liquid and to convey it to a mobile compartment, which neither reference seems to provide here; claims 15 and 16 may stand or fall with intermediate claim 14. Claim 17 has the distinction of combining the elastomeric receptor with a mobile cart and precluding rinsing when at rest on the cart; claim 18 recites absence of the wall along a part of the receptor; claim 19 recites that the receptor discharge opening be remote from the missing part of the receptor base; and claim 20 recites that the receptor means is substantially U-shaped in plan view. Of course, claims 18, 19, and 20 will be deleted in the event that the Proposed Amendment After Final is entered, whereupon their grouping for this purpose will become moot.

Related reasons for patentability are detailed further below.

## 8. ARGUMENT

## A. The Prior Art References

SMITH, Applicant-Appellant's prior patent for **Liquid Disposal Automotive Accessory** (not cited until final rejection), discloses a modified console located between an automobile's front seats, having a funnel supplied with rinse water from a remote compartment, and discharging via a rubber tube directly to an underlying street, etc.

COFFMAN teaches a **Readily Portable Shampoo Device** having a wash bowl semicircular in plan with a wall conforming to a person's neck, laterally movable to and from--and supported by--an accompanying cart having a separate rinse water nozzle on a flexible hose with hot and cold running water from a pair of supply tanks on the cart and draining into a separate waste water tank also on the cart.

## B. Refuting the 102 Rejection - Claims 13 and 17.

SMITH's funnel does NOT meet claim 13's elastomeric receptor means, despite the Examiner's reliance upon its col. 5, lines 38-42 (in an Advisory Action) because the specific composition examples of funnel composition are "of glass or of a thermosetting phenol-formaldehyde or urea-formaldehyde resin." General mention there of "similar composition"--to what was suggested for the tubing--accords with the rule of *inclusio unius exclusio alterius*, meaning that the specific recital for the funnel controls over the general reference to compositions for the tubing, including rubber and other polymers (synthetic) even though some thereof might be somewhat elastomeric; for glass and the mentioned (thermosetting) resins are quite rigid.

Dependent claim 17 is drawn to the combination of claim 13's receptor means with a "mobile sanitation cart" not taught by SMITH.

C. Refuting the 103 Rejection - Claims 9 to 12, 14 to 20.

Independent claim 9 is drawn to an improvement in mobile sanitation apparatus having housing means--which by the Proposed Amendment would be recited specifically as "**cart** apparatus"--which is what the present specification discloses, whereas the reference specification is limited to accessory means and methods for use in motor vehicles.

Dependent claim 12 recites that the temporary waste storage compartment (of claim 9) is **at a height enabling it to be discharged into a toilet bowl as well as into an underlying conventional drain.**

The Examiner pooh-poohs this [final rejection, top page 3], saying:

*'The height of claim 12 fails to define over Smith in that toilet bowls and vehicles are known in such varying heights as to make the term "positionable over" practically non-definitive of a height.'*

Both references obviously fail to suggest this claimed feature. Thus, Applicant defends this claim recital as adequately definitive, and controverts such assertion by the Examiner as being an arbitrary and capricious abuse of the Examiner's quasi-judicial discretion. If the Examiner has no reference to support it, he should have made of record here his affidavit of special knowledge. Absent that, the otherwise unsupported rejection of claim 12 should be reversed.

As for distinction of claim 13's dependent claims 14 to 20: Claim 14 recites a flexible discharge outlet tube for connection to the elastomeric receptor to convey waste liquid to a nearby mobile compartment; SMITH has no such compartment so such tube is moot, and COFFMAN actually seems to lack such flexible discharge outlet tube. Claims 15 and 16 share the patentability of intermediate claim 14.

**C. Refuting the 103 Rejection - (cont'd)**

Claim 17 (dependent upon independent claim 13) has the noted distinction of a combined mobile cart, with an inert position for the elastomeric receptor means when retracted to rest on the cart; although a somewhat similar arrangement appears in SMITH, that reference does not have the mobile sanitation cart; yet COFFMAN, who has a cart, teaches only shampooing and, thus, away from claim 17.

As claims 18 through 20 would be deleted if the Proposed Amendment were entered, it is noted here that claim 18 recites absence of the wall along a minor peripheral part of the elastomeric receptor, whereas COFFMAN merely makes a semicylindrical depression therein; claim 19 recites that the receptor discharge opening is remote from the absent part of the receptor base; and claim 20 recites that the receptor means is substantially U-shaped in plan view--features not suggested in either SMITH or COFFMAN, so not suggested by them both.

**D. The Applicable Law****1. Anticipation - Claims 13 and 17.**

In *In re Donohue*, 226 USPQ 619, at 621, the court said:

"It is elementary that an anticipation rejection requires a showing that each limitation of a claim must be found in a single, reference, practice, or device...*Kalman v. Kimberly-Clark Corp*, 218 USPQ 781 (Fed Cir 1983). As noted above, SMITH is deficient in the requisite **elastomeric receptor means**, and **mobile sanitation cart**."

This is well known to the Examiner, but he has disregarded it, except to misinterpret SMITH as providing such a showing whereas the contrary is clear upon simple visual inspection. No other citation of authority should be needed to defeat this rejection.

## D. Applicable Law (cont'd)

## 2. Unpatentability - Claims 9 to 12, 14 to 20.

This rejection, upon SMITH in view of COFFMAN, must meet the requirement that their teachings would be likely to be combined by persons ordinarily skilled in the art to provide what is defined in the appealed claims--or a very close equivalent thereof. Applicant has pointed out above inconsistencies in attempting to combine them.

The mere fact that prior art teachings could be so modified would not make the result obvious unless the prior art suggested the desirability of such combination and modification--not done here. Please see, for example, *In re Fritch* and *In re Gordon*.

Furthermore, hindsight reconstruction to supply deficiencies in the factual basis is improper. Please see *In re Warner*. The Examiner's attempted combination of references is faulty for the reason enunciated in *In re Hummer*, 113 USPQ 66 (CCPA 1957):

"This seems to be a double departure from the actual teaching of Wittner and a reconstruction of his disclosure in the light of applicant's specification...We agree with the analysis in the appellant's brief that the Board 'proposes to modify the secondary reference before it is employed to modify the primary reference'...Wittner is a reference only for what it clearly discloses or suggests and such modification as has been attempted is not a proper use of this patent as a reference. *In re Demarche...*"

This has evolved into the "invention as a whole" doctrine--but has been ignored sometimes by examiners, as in the present appeal.

John Tresansky in *The "Subject Matter as a Whole" in Obviousness Determinations*, 66 J.P.O.S. 348, traces the path of development of the "invention as a whole" and cites examples of its application.

## VII. CONCLUSIONS

## A. Art Rejection under 35 USC 102

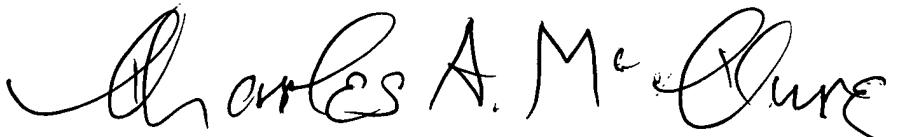
Neither claim 13 nor claim 17 is unpatentable under 35 USC 102 as anticipated by SMITH.

## B. Art Rejection under 35 USC 103

No one or more of claims 9 to 12, or 14 to 20, is unpatentable under 325 USC 103 over SMITH in view of COFFMAN et al.

**WHEREFORE**--There Being No Other Objection/Rejection, Applicant prays that the rejection be reversed in every particular and that the application be allowed in its entirety pursuant to this appeal.

Respectfully submitted,

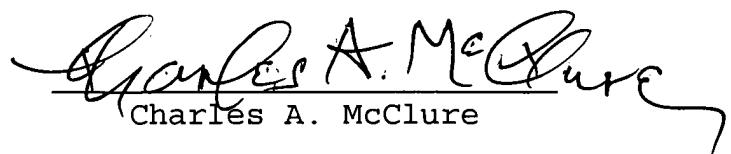


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## EXPRESS MAIL CERTIFICATE

I hereby certify that this paper and all documents accompanying it are being transmitted to the Commissioner of Patents and Trademarks, Washington, D.C. 20231, on the date last stated above by EXPRESS MAIL No. TB72496082XUS.



Charles A. McClure

**Appealed Claims Excluding Proposed Amendment**

9. In mobile sanitation apparatus having housing means, the improvement comprising temporarily deformable elastomeric receptor means for a patient's waste liquid,

tubular means adapted to conduct the waste liquid from the receptor means into a temporary waste liquid storage compartment in the housing means, and

rinse means for rinsing clean the waste liquid path from the receptor means into the storage compartment.

10. Improvement in mobile sanitation apparatus according to claim 9, including pumping means adapted to pump the rinse water to the receptor means, from which it drains into the temporary storage compartment.

11. Improvement in mobile sanitation apparatus according to claim 10, wherein the housing means includes a compartment of rinse water and wherein the pumping means forces air into that compartment to force the rinse liquid to the receptor means.

12. Improvement in mobile sanitation apparatus according to claim 9, wherein the temporary storage compartment is at a height enabling it to be positionable over and be discharged into a toilet bowl as well as into an underlying conventional drain.

**Appealed Claims Excluding Proposed Amendment**

13. In mobile sanitation means, the improvement comprising elastomeric receptor means for waste liquids, having a base with a discharge outlet and having a hollow wall upstanding surrounding a major part of the base and having an opening into the wall hollow and openings connected therewith through and along the wall and facing inward therefrom for rinse water supplied to the hollow to flow down the wall and over the base to the discharge opening.

14. The improvement according to claim 13, in combination with a flexible discharge outlet tube for connection to receive waste liquid and to convey it to a mobile compartment for waste water.

15. The improvement according to claim 14, in combination with a flexible rinse water supply tube for connection to the wall hollow from a mobile compartment of rinse water.

16. The improvement combination according to claim 14, wherein the flexible discharge outlet tube has a rest position relative to a mobile sanitation cart, when not receiving waste liquid or rinse water, and may be extended from its rest position to relocate the elastomeric receptor means in a variety of extended use positions.

17. The improvement according to claim 13, in combination with a mobile sanitation cart having a rest position for the elastomeric receptor means, wherein the supply of rinse water is discontinued whenever the receptor means is in the rest position.

**Appealed Claims Excluding Proposed Amendment**

18. The improvement according to claim 13, wherein the wall of the receptor means is absent along a minor part of the base.

19. The improvement according to claim 18, wherein the discharge outlet is located in a part of the base remote from the part of the base from which the wall is absent.

20. The improvement according to claim 18, wherein the wall of the receptor means is substantially U-shaped in plan view.

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In the application of :  
ANTHONY SMITH : Group Art Unit 3105  
Serial No. 506,851 :  
Filed 25 July 1995 : Examiner C. Phillips  
For HOSPITAL LIQUID SANITATION CART:

**PROPOSED NO-FEE AMENDMENT AFTER FINAL REJECTION  
FOR ALLOWANCE OR TO SIMPLIFY ISSUES FOR APPEAL**

To the Commissioner:

This is responsive to the PTO action dated 26 November 1996.

Please amend this application as follows.

IN THE CLAIMS--

Claims 1, 6, and 9, line 1 of each, between "sanitation" and "apparatus" insert --cart--.

Claim 1, line 5, between "positionable" and "cuplike" insert -- temporarily deformable --.

Cancel claims 18, 19, and 20.

**R E M A R K S**

**Status Summary**

Claims 1, 2, 6, 13, and 17 stand rejected under 35 USC 102 as anticipated by Smith (a former patent granted to Applicant here).

Claims 3 to 5, 7 to 12, and 14 to 20 stand rejected under 35 USC 103 as unpatentable over Smith in view of Coffman et al.

Applicant respectfully requests favorable reconsideration of this application, with the objective of rendering it allowable, or at least simplifying the issues for appeal by reduction in number of claims from twenty to seventeen by deletion of claims 18, 19, and 20 and by accompanying rewording limitation of claim 1, etc.

**This Proposed Amendment**

Besides the mentioned proposed deletion of several claims, this response proposes insertion of cart in independent claims 1, 6, 9 as favoring allowance or, alternatively, simplifying the appeal issues. The word "cart" is NOT new, being already in the Title, and referred to in claim 16, and also positively claimed in claim 17.

This response also proposes to insert temporarily deformable in claim 1 as a modifier of "cuplike receptor" being already present in independent claim 9 (along with "elastomeric"--itself also already in independent claim 13). Hence, NO new search is appropriate here.

**The Final Rejection**

Applicant respectfully notes that neither reference discloses nor suggests either "**elastomeric**" or "**temporarily deformable**"--much less, "**temporarily deformable elastomeric**"--cuplike receptor means. Thus, such receptor is NEITHER fully met (102) NOR unobvious (103).

The Examiner has never indicated how Smith's (rigid) funnel or Coffman's (rigid) shampoo bowl could meet these claim requirements, one or both already being present in independent claims 6, 9, & 13.

The only references (Wines and Freitas) relied upon in the only prior action on the merits also lack any such pertinent disclosure.

Dependent claims 12 and 18, further considered by the Examiner, share such patentability of their respective independent claims.

Also, Coffman's "Readily Portable Shampoo Device" and Smith's "Liquid Disposal Automobile Accessory" are from non-analogous arts. Neither reference--much less any combination of them--can be relied upon appropriately to reject Applicant's claims in this application.

**Conclusions**

Entry of this amendment would not introduce any limitation not already claimed herein, nor would it require any further search, and by claim deletion and amendment it would simplify issues for appeal.

Applicant submits that the claims, as proposed to be amended hereby, are neither anticipated nor unpatentable over the prior art.

Accordingly, Applicant urges allowance of this application.

Absent allowance, he urges entry hereof for purpose of appeal.

Respectfully submitted,

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**REGULAR MAIL CERTIFICATE**

The undersigned hereby certifies that this paper is addressed, postage prepaid, to the Commissioner of Patents and Trademarks, Washington, D.C. 20231, and is being mailed thereto on the date last stated above.

ORIGINAL SIGNED BY  
**CHARLES A. MCCLURE**

**Appealed Claims Including Proposed Amendment**

9. In mobile sanitation cart apparatus having housing means, the improvement comprising temporarily deformable elastomeric receptor means for a patient's waste liquid,

tubular means adapted to conduct the waste liquid from the receptor means into a temporary waste liquid storage compartment in the housing means, and

rinse means for rinsing clean the waste liquid path from the receptor means into the storage compartment.

10. Improvement in mobile sanitation apparatus according to claim 9, including pumping means adapted to pump the rinse water to the receptor means, from which it drains into the temporary storage compartment.

11. Improvement in mobile sanitation apparatus according to claim 10, wherein the housing means includes a compartment of rinse water and wherein the pumping means forces air into that compartment to force the rinse liquid to the receptor means.

12. Improvement in mobile sanitation apparatus according to claim 9, wherein the temporary storage compartment is at a height enabling it to be positionable over and be discharged into a toilet bowl as well as into an underlying conventional drain.

**Appealed Claims Including Proposed Amendment**

13. In mobile sanitation means, the improvement comprising elastomeric receptor means for waste liquids, having a base with a discharge outlet and having a hollow wall upstanding surrounding a major part of the base and having an opening into the wall hollow and openings connected therewith through and along the wall and facing inward therefrom for rinse water supplied to the hollow to flow down the wall and over the base to the discharge opening.

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16. The improvement combination according to claim 14, wherein the flexible discharge outlet tube has a rest position relative to a mobile sanitation cart, when not receiving waste liquid or rinse water, and may be extended from its rest position to relocate the elastomeric receptor means in a variety of extended use positions.

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